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In the Supreme Court of the United States

October Term, 1975

No. 75-429

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN GEORGE WEYMAN,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRUCE E. COOPER,
COOPER, FRIEDMAN & BUTLER,
Attorneys for Petitioner

Two North Market Square,
Harrisburg, Pennsylvania 17108
717—234-3167

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, John George Weyman, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Superior Court of Pennsylvania rendered in these proceedings on April 22, 1975.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania, as yet unreported, appears at Appendix A, infra, pp. 25-30. The opinion of the Court of Common Pleas of Cumberland County is unreported and appears at Appendix B, infra, pp. 31-35. The Supreme Court of Pennsylvania denied the petitioner's petition for allowance of appeal by order dated August 18, 1975, which order appears at Appendix C, infra, p. 36.

JURISDICTION

The opinion and judgment of the Superior Court of Pennsylvania was entered on April 22, 1975. The order of the Pennsylvania Supreme Court denying petitioner's petition for allowance of appeal was entered on August 18, 1975. See Appendix C, p. 36, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The petitioner was the defendant in a criminal case wherein he was charged with conspiracy to print and manufacture lottery tickets. At the trial, petitioner's counsel attempted to cross-examine the State Police officer as to the basis of the search warrant by which the petitioner's alleged co-conspirator's business/residence was searched and which search resulted in the confiscation of a number of football lottery tickets and statements by the alleged co-conspirator which implicated the petitioner. The lower court refused to allow this line of questioning (R. 26a). Following the trial, the Pennsylvania Superior Court filed an opinion which liberalized the rules for standing for the purpose of attacking the validity of a search warrant. Petitioner filed a motion in arrest of judgment and for a new trial on this basis. The lower court held that the case did not give petitioner the right to question the legality of the warrant (Appendix B, infra, p. 34). It also held that petitioner had not made a timely application to suppress evidence under Pennsylvania Rules of Criminal Procedure, Rule 323(b), and had waived the right (Appendix B, infra, p. 35). A few months later, while the petitioner's case was on appeal to the Superior Court, the Pennsylvania Supreme Court decided another case which again liberalized the definition of standing to attack the validity of a search warrant.

On appeal before the Pennsylvania Superior Court, petitioner argued that under the existing law it would have been a futile gesture to file a motion for suppression of

the evidence prior to the two new decisions. The Superior Court held that, despite the state of the law at the time of the trial, petitioner had waived his right to question the validity of the search warrant and that the interests of justice did not require a consideration of this issue by the Superior Court (Appendix A, infra, pp. 26-29).

At trial, the lower court also refused to allow petitioner's counsel to question the alleged co-conspirator on whether he was deprived of his constitutional rights, so as to raise the issue of whether petitioner could benefit therefrom (R. 61a). The Superior Court held that this issue was also waived because it was not raised in a motion to suppress (Appendix A, infra, p. 29). The questions thereby arising are:

1. Did the petitioner enter into a voluntary and intelligent waiver of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States by failure of his counsel to file a pretrial motion when the relief sought would probably have been denied under the case law in existence at that time? More specifically, did the Superior Court of Pennsylvania err in refusing to consider the merits of petitioner's constitutional defenses on direct appeal in view of the interim change in the law?

2. Were the petitioner's rights under the Fourth and Fourteenth Amendments of the Constitution of the United States violated by virtue of the fact that he was not permitted to inquire as to the validity of the search warrant pursuant to which his alleged co-conspirator's business/residence was searched, where

the fruits of the search comprised the only evidence against the petitioner?

3. Were the petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States violated by virtue of the fact that he was not permitted to inquire as to the violation of these rights of his alleged co-conspirator whose statements under interrogation led to the petitioner's arrest?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On October 29, 1973 the Pennsylvania State Police executed a search warrant that authorized a search of Stejan Printing Company, owned and operated by one Stephen Zentmeyer, petitioner's alleged co-conspirator (R. 15a). The State Police confiscated a number of football lottery tickets and blank forms for printing additional tickets (R. 19a). Zentmeyer gave a statement to the police implicating petitioner as the one who ordered the printing of these tickets and, as a result, petitioner was charged with conspiracy at No. 44 February Term, 1974, Cumberland County, Pennsylvania (R. 31a-33a).

The case was tried without a jury on February 14, 1974, before the Honorable Dale F. Shughart, President Judge. At the trial, petitioner's counsel attempted to cross-examine the State Police officer as to the basis of the search warrant. The lower court refused to allow this line of questioning, stating: "I don't think your client has a right to attack the search warrant. I think the Zentmeyers are the only people that can do that." (R. 26a)

Mr. Zentmeyer appeared at all proceedings without counsel. Prior to petitioner's trial, he had pled guilty without benefit of counsel and, at trial, was awaiting sentence. His testimony clearly incriminated himself as well as petitioner. The lower court refused to allow petitioner's counsel to question Zentmeyer on whether he was deprived of his constitutional rights, so as to raise the

issue of whether petitioner could benefit therefrom (R. 61a).

The petitioner was found guilty of the offense as charged, and was subsequently sentenced to a term of one year's imprisonment and to pay a fine of Two Thousand Dollars.

The petitioner filed motions for new trial and in arrest of judgment, which averred, in part:

> "6. The alleged accomplice was not represented by counsel."

On April 3, 1974, following the trial and the filing of the motions, but prior to argument on the motions, the Pennsylvania Superior Court filed an opinion in *Commonwealth v. Tasco*, 227 Pa. Superior Ct. 144, 323 A. 2d 831 (1974). Petitioner, in his motions before the lower court, argued that the *Tasco* case liberalized the rules for standing for the purpose of attacking the validity of a search warrant. The Court held that petitioner could not claim the benefit of the deprivation of the constitutional rights of Zentmeyer (Appendix B, infra, p. 34). It also held that the *Tasco* case did not give petitioner the right to question the legality of the warrant (Appendix B, infra, pp. 34-35). Further, it held that petitioner had not made a timely application to suppress evidence under the Pennsylvania Rules of Criminal Procedure, Rule 323(b) (Appendix B, infra, p. 35). Petitioner's motions for new trial and in arrest of judgment were denied.

The petitioner appealed from the judgment of sentence to the Superior Court of Pennsylvania, to No. 1365 October Term, 1974. On July 1, 1974, the Pennsylvania

Supreme Court decided the case of *Commonwealth v. Weeden et al.*, 457 Pa. 436, 322 A. 2d 343, cert. denied (1974), which again liberalized the definition of standing to attack the validity of a search warrant.

Petitioner argued before the Pennsylvania Superior Court that under existing law it would have been a futile gesture to file a motion for suppression of the evidence prior to the *Tasco,* supra, and *Weeden,* supra, decisions. The Superior Court held that, despite the state of the law at the time of the trial, petitioner had waived his right to question the validity of the search warrant (Appendix A, infra, pp. 26-29). It also held that the petitioner had waived the issue of deprivation of the alleged co-conspirator's rights (Appendix A, infra, p. 29). The court refused to consider the merits of either of these questions on direct appeal and suggested that the questions might be more appropriately litigated in the form of a Post Conviction Hearing Act petition alleging ineffective assistance of counsel (Appendix A, p. 29).

The petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. This petition raised, along with the substantive questions concerning standing to question the validity of the search warrant and standing to inquire into the deprivation of the alleged co-conspirator's rights, the questions of whether the petitioner had waived his Constitutional rights and whether the Superior Court had erred in refusing to consider the issues on the merits, in view of the change in the law. The petition was denied by order dated August 18, 1975 (Appendix C, infra, p. 36).

REASONS FOR GRANTING THE WRIT

1. The Pennsylvania Superior Court's Opinion Directly Conflicts With This Honorable Court's Opinion in Curtis Publishing Co. v. Butts, 87 S. Ct. 1975, 388 U.S. 130, 18 L. Ed 2d 1094 (1967)

Both the lower court and the Pennsylvania Superior Court, in addressing themselves to the issue of the petitioner's standing to question the validity of the search warrant, held that the petitioner had waived the issue by failing to file a pretrial motion to suppress under the Pennsylvania Rules of Criminal Procedure, Rule 323(b). The Superior Court refused to consider the merits of the petitioner's argument, which was based upon two Pennsylvania appellate court decisions issued after the petitioner's trial which liberalized the definition of standing to question the validity of a search.

By refusing to consider the merits of the petitioner's argument, the Superior Court disregarded the holding of this Honorable Court in *Curtis Publishing Co. v. Butts,* 87 S. Ct. 1975, 388 U.S. 130, 18 L. Ed. 2d 1094 (1967). In that case, which involved a libel action, the only defense raised at trial was one of substantial truth. No Constitutional defenses were raised although defense counsel was aware that at that time *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), was in the process of being considered. Shortly after the rendering of the verdict, the *New York Times*

decision was handed down, and the defense immediately brought it to the lower court's attention through a motion for new trial. The lower court denied the motion on the merits and the Court of Appeals, refusing to reach the merits, held that the issue had been waived. This Honorable Court, through Mr. Justice Harlan, determined that the issue had not been waived. It stated:

> "Before we reach the constitutional arguments put forward by the respective petitioners, we must first determine whether Curtis has waived its right to assert such arguments by failing to assert them before trial. As our dispositions of Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597, and other cases involving constitutional questions indicate, the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground . . . an effective waiver must . . . be one of a 'known right or privilege.'" (Footnote citing numerous authorities omitted; citations omitted.) 87 S. Ct. at 1985, 388 U.S. at 142-143, 18 L. Ed. 2d at 1104.

The facts of the instant case are almost identical to those of *Curtis*, supra, for in both cases at time of trial the Constitutional defense not raised was "at least arguable".[1] See Appendix A, infra, p. 28. However,

[1] In *Curtis*, supra, defense counsel was at the time of trial aware of the issues raised in the *New York Times* case. In the case at hand, one Pennsylvania decision somewhat supported the proposition that petitioner had standing to challenge the validity of the search, though the case was by no means conclusive of the issue.

after trial in both cases appellate decisions were handed down which supported the defendants' position. Accordingly, the defense attorneys moved for new trials on this basis. On appeal from denial of the motions the appellate courts held that the issue had been waived, and refused to consider the merits.

In the case at hand, the Superior Court suggested that the petitioner might gain some relief through a Post Conviction Hearing Act petition averring ineffective assistance of counsel, rather than by having the merits of the Constitutional issues determined on direct appeal. Such a solution is unsatisfactory for two reasons. First, the test of ineffective assistance of counsel in Pennsylvania is whether there was "any reasonable basis" for counsel's course of conduct. *Com. ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A. 2d 349 (1967). This test would be unlikely to be satisfied where the issues not raised by defense counsel was, in the Superior Court's own words, only "arguable". Second, to force the petitioner to undergo incarceration and then file a petition of this type is to deprive him of "promptness of decision" which has been characterized by this Court as "one of the elements of justice". *County of Allegheny v. Frank Mashuda Company*, 79 S. Ct. 1060, 360 U.S. 185, 3 L. Ed. 2d 1163 (1959), at 1067, 196-197, 1171.

Because the Pennsylvania Superior Court's opinion directly conflicts with this Honorable Court's opinion in *Curtis*, supra, the petition for writ of certiorari should be granted.

2. The Merits of This Case Mandate That the Writ of Certiorari Be Granted

The Superior Court of Pennsylvania refused to address itself to the merits of the petitioner's constitutional arguments. These are as follows:

A. The petitioner's rights under the Fourth and Fourteenth Amendments of the Constitution were violated by virtue of the fact that he was not permitted to inquire as to the validity of the search warrant pursuant to which his alleged co-conspirator's business/residence was searched.

The police officer testified at the trial that he searched the Zentmeyer residence pursuant to obtaining a search warrant. When petitioner's counsel sought to cross-examine the officer concerning the warrant, the following conversation occurred:

> "The Court: We're not going to get into that. The only people that can raise a question of that search are the Zentmeyers, and I don't see they're raising it.
>
> Mr. Cooper: I would like to raise it. Perhaps it is premature in this case. It may be an issue.
>
> The Court: You may state for the record you want to raise it and I will rule on that right now.
>
> Mr. Cooper: I don't know who the other witnesses are, Judge, but I would feel I would be entitled to see the search warrant.
>
> The Court: I don't think there is anything wrong with your seeing the search warrant, but the point I want to make, I don't think your client has a right to attack the search warrant. I think the Zentmeyers are the only people that can do that." (R. 26a)

The issue, then, is whether petitioner had the requisite "standing" to question the legality of the warrant. To so qualify, petitioner must be a "person aggrieved" by the search. *Jones v. United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 702, 78 A.L.R. 2d 233 (1960).

Contrary to the lower court's ruling, petitioner did have standing to question the legality of the search warrant. In *Commonwealth v. Weeden et al.,* 457 Pa. 436, 322 A. 2d 343 (1974), which was decided after the petitioner's trial the Supreme Court of Pennsylvania held that a defendant had standing to challenge the search of the apartment of his codefendant's fiancee and the seizure therefrom of marijuana.* In that case, the defendant Weeden was charged with felony-murder, the alleged felony being robbery of the victim. The marijuana which was obtained in the search of the codefendant's fiancee's apartment was from the same lot as that found in the victim's apartment and was introduced to prove that a robbery had occurred. The prosecution sought to establish that Weeden had participated in the robbery through a jury inference that Weeden had constructive possession of the marijuana at the time of the search. Such alleged constructive possession afforded Weeden the requisite standing to challenge the legality of the search.

The *Weeden* decision is similar to that of *U. S. v. Birrell,* 242 F. Supp. 191 (1965, S.D. N.Y.), in which records belonging to the defendant which were seized from the office of his attorney were held inadmissible.

The case at hand falls directly under the rationale of *Weeden*, supra. In an effort to prove that petitioner Weyman conspired to commit the unlawful act of printing or manufacturing lottery tickets, the Commonwealth offered into evidence various tickets which, allegedly, Weyman had ordered to be printed by Zentmeyer. The Commonwealth sought to prove, through the oral testimony of Zentmeyer, that Weyman had ordered these tickets, and had, in the past, paid for similar tickets. The inference to be drawn was that Weyman had constructive possession of the tickets. Indeed, if the tickets had not been contraband, and if Weyman had in fact ordered their manufacture, he would have clearly had an "insurable interest" in them under the Uniform Commercial Code, Pa. S. Title 12A, §2-501. Weyman's alleged constructive possession of the tickets gave him standing to question the legality of the search and the admissibility of not only the tickets and photographs of Zentmeyer's basement, but also Zentmeyer's statements which implicated Weyman and which were a direct product or "fruit" of the search. It should be noted that as in *Weeden*, supra, the fruit of the search, in this case Zentmeyer's testimony, was the only evidence introduced which connected the defendant with the alleged crime.

The *Weeden* decision followed closely on the heals of *Commonwealth v. Tasco*, 227 Pa. Superior Ct. 144, 323 A. 2d 831 (1974), also decided after the petitioner's trial, in which illegally seized evidence was held to be inadmissible against persons lawfully on the premises at the time of the search. Both of these cases expanded the doctrine in Pennsylvania of who qualifies as a "person aggrieved" by an unlawful search and seizure. Prior to

Tasco, supra, the Pennsylvania law on this subject was determined by the case of *Commonwealth v. Smith*, 201 Pa. Superior Ct. 511, 193 A. 2d 778 (1963), in which the court said at pp. 516, 780:

> ". . . Moreover, 'In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.' Jones v. United States, 362 U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697, 702, 78 A.L.R. 2d 233. . . ."

Several jurisdictions that have moved away from the strict standing requirement put forth in *Jones v. U. S.*, supra, and *Wong Sun v. U. S.*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), are Wisconsin, *State v. Mabra*, 213 N.W. 2d 545 (1974); Maine, *State v. Gallant*, 308 A. 2d 274 (1973). (In that case the Court emphasized the concept of "expectation of privacy". It held that the issue of whether governmental action constitutes a search depends less on the designation of an area than upon determination of whether the examination is a violation of privacy on which an individual justifiably relied as secure from invasion.) Oregon, Oregon Criminal Law Revision Committee, Section 40, Part 2 of Prearraignment Provisions, Article 5, Search and Seizure Preliminary Draft No. 3, May, 1972; New York, New York Code of Criminal Procedure, Section 813-C, McKinney Supp. Sept. 1971, *People v. Martin*, 290 P. 2d 855 (1955). In New York and California, the standing requirement has been

abolished altogether. All illegally seized evidence is inadmissible in all criminal proceedings in those states.

Codefendants have been recognized in Federal Courts as having standing to question the legality of searches directed against codefendants. *Binkiewicz v. Scafati,* 281 F. Supp. 233 (1968, Dist. Ct. of Mass.); *McDonald v. U. S.,* 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948); *Rosencranz v. U. S.,* 334 F. 2d 738 (First Circuit, 1964). Finally, the Model Penal Code, Article 290, Search and Seizure 290.1 (5) provides:

> "A motion to suppress may be made by any defendant against whom things seized are to be offered in evidence at a criminal trial. If such things were obtained by a search of or seizure from
>
> (a) the defendant; or
>
> (b) a spouse, parent, child, brother, or sister of the defendant, or any member of his household; or
>
> (c) any person with whom the defendant resides or sojourns;
>
> (d) a co-defendant, co-conspirator, or any person chargeable with the same crime with which the defendant is charged; or
>
> (e) any person with whom the defendant conducts a business; or
>
> (f) any other person if from the circumstances, it appears that the search or seizure was intended to evade the application of this [section] to any of the persons described in paragraphs (a) to (e) inclusive."

The commentary to this section explains that:

> "The Jones and Alderman cases settle the point that, at the constitutional level, the right to raise Fourth Amendment claims can be limited to those whose own Fourth Amendment rights have been invaded. On the policy level, the Reporters were persuaded to the view expressed by Judge Traynor in the Martin case. The problem of standing has been a vexing one conceptually, productive of aridly technical discussion and the accused has standing to object to the use of evidence which may send him to jail, and which was obtained by unlawful means. The logic of the exclusionary rule, and the deterence objectives on which it is based, apply equally whether or not the search itself 'aggrieved' the defendant." ALI, Model Code of Pre-arraignment Procedure, supra, p. 217.

This trend away from a strict standing requirement is based on the idea that the purpose of the exclusionary rule is to deter illegal police conduct. *Linkletter v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965). This purpose is not promoted by the standing requirement which nevertheless allows illegally seized evidence to be utilized by the government in some prosecutions. The problem is especially clear in a case, like the Weyman case, of conspiracy, and was described in 118 U. Pa. L. R. 333, "Standing to Object to Search and Seizure", at p. 351:

> "Police are often tempted to make illegal searches during the investigation of a large conspiracy. Once the police have established that several

> individuals are involved, they may deem it worthwhile to violate the constitutional rights of one member of the conspiracy (particularly a minor member) in order to obtain evidence for use against others. The present rule of standing encourages such an approach because the police know that the evidence which they seize in an unlawful search will be suppressed only in the trial of the victim of the search."

To alleviate this problem, the author of the above cited article recommended the following rule of standing at p. 353:

> "From this analysis, then, the following rule of standing is recommended: if a reasonable man in the officer's position at the time of the search would seek to obtain evidence against either the defendant or the class of people to which the defendant belongs, the defendant has standing."

Because under interpretation of the Fourth and Fourteenth Amendments of the United States Constitution in Pennsylvania and numerous other jurisdictions the petitioner had the requisite standing to inquire into the validity of the search of his alleged co-conspirator's business/residence, the writ of certiorari should be granted.

B. The question of whether a defendant has standing to inquire into the violation of his alleged co-conspirator's Fifth and Sixth Amendment Constitutional rights should be answered affirmatively.

Petitioner's counsel was not permitted by the lower court to inquire as to whether the alleged co-conspirator

was informed of his Constitutional rights when the police raided his business/residence and interrogated him there and subsequently. This inquiry was particularly important in the case because: (1) the alleged co-conspirator did not plead guilty until months after his arrest; (2) the charge against petitioner was not brought until several weeks after the alleged co-conspirator's arrest; (3) the alleged co-conspirator's testimony was the only evidence presented at trial which linked the petitioner with the seized lottery tickets; (4) the alleged co-conspirator never had the benefit of counsel throughout these proceedings.

Courts throughout the country have held that Fourth Amendment protections extend beyond just the person whose rights thereunder have been directly violated. However, this extension of standing to object to Constitutional violations has not been applied to Fifth and Sixth Amendment rights.

The reasoning behind this distinction was discussed in *People v. Varnum,* 59 Cal. Rpt. 108, 427 P. 2d 772 (1967), at pages 111-112, 775-776:

> "In cases of searches and seizures conducted in violation of the Fourth Amendment we have held that the defendant has standing to object even when his own rights were not violated . . . Otherwise the deterrent effect of the exclusionary rule would be seriously weakened. Defendant contends that we should apply the same rule to Escobedo-Dorado-Miranda violations effectively to deter unlawful police interrogations. Noncoercive questioning is not in itself unlawful, however, and the Fifth and Sixth Amendment rights protected by Escobedo, Dorado and

Miranda are violated only when evidence obtained without the required warning and waiver is introduced against the person whose questioning produced the evidence. The basis for the warning required by Miranda is the privilege against self-incrimination . . . and the privilege is not violated when the information elicited from an unwarned suspect is not used against him . . . Similarly the right to counsel protected by Escobedo and Dorado is not infringed when the exclusion of any evidence obtained through the violation of the rules of those cases precludes any interference with the suspect's right to effective representation . . . Unlike unreasonable searches and seizures, which always violate the Constitution, there is nothing unlawful in questioning an unwarned suspect so long as the police refrain from physically and psychologically coercive tactics condemned by due process and do not use against the suspect any evidence obtained. Accordingly, in the absence of such coercive tactics, there is no basis for excluding physical or other non-hearsay evidence acquired as a result of questioning a suspect in disregard of his Fifth and Sixth Amendment rights when such evidence is offered at the trial of another person."

While this reasoning might make sense in most prosecutions, it does not make sense in the case of a conspiracy prosecution, such as the case at hand and we respectfully suggest that a different rule should apply.

In a conspiracy prosecution, each conspirator is thought to represent his co-conspirators with respect to the illegal act to be accomplished and everything said or

done by any of the co-conspirators in pursuance of the common purpose is admissible against all co-conspirators. The act of one is the act of all. *Commonwealth v. Bobko,* 34 Leh. L. J. 221 (1971); *Commonwealth v. Lowry,* 374 Pa. 594, 98 A. 2d 733 (1953); *Commonwealth v. Strantz,* 328 Pa. 33, 195 A. 75 (1937). In conspiracy trials, the "conspiracy hearsay exception" allows into evidence against all other conspirators the acts and declarations of any conspirator. *United States v. DeCavalcante,* 440 F. 2d 1264 (3rd Cir., 1971). This exception to the hearsay rule is thought to be based on agency principles. Judge Learned Hand explained the exception in *Van Riper v. United States,* 13 F. 2d 961 (2d Cir. 1926), at p. 967:

> "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of the crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all."

See, generally, "Criminal Law: The Conspiracy Hearsay Exception and Its Erratic Application", 76 Dick. L. R. 728. That co-conspirators are thought to be agents of one another by virtue of their unlawful agreement is further demonstrated by the fact that each member is legally responsible for the acts of any of the other members. *Commonwealth v. Wilson,* 449 Pa. 235, 296 A. 2d 719 (1972).

Because the law views co-conspirators as agents of one another who are responsible for each other's words and deeds, the deprivation of Constitutional rights suf-

fered by any one conspirator is suffered by the others. In the case at hand, the alleged co-conspirator's confession and testimony, evoked without the benefit of Miranda warnings or legal counsel, comprised the only evidence which linked petitioner with the alleged lottery tickets, and were tantamount to a confession by petitioner himself. For this reason, the lower court erred in disallowing petitioner's counsel from claiming the benefit of the deprivation of the alleged co-conspirator's Constitutional rights. For this reason, the writ of certiorari should be granted.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Superior Court of Pennsylvania for two reasons. First, the Superior Court's opinion is in direct conflict with this Honorable Court's opinion in *Curtis Publishing Co. v. Butts,* 87 S. Ct. 1975, 388 U.S. 130, 18 L. Ed. 2d 1094 (1967). Second, the merits of petitioner's Constitutional arguments, to which the Superior Court refused to address itself, bear prompt determination.

Respectfully submitted,
BRUCE E. COOPER,
COOPER, FRIEDMAN & BUTLER,
Counsel for Petitioner.

APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1365 October Term, 1974

Commonwealth of Pennsylvania

v.

John George Weyman,

Appellant

Appeal From the Judgment of Sentence Imposed by the Court of Common Pleas, Criminal, of Cumberland County at No. 44 February Term, 1974.

Opinion by Hoffman, J., filed: April 22, 1975.

Appellant, convicted of conspiracy to violate §5513 of the Crimes Code,[1] contends that the lower court erred in limiting defense counsel's cross-examination of two witnesses and that the Commonwealth failed to prove appellant's guilt beyond a reasonable doubt.

On October 29, 1973, Sergeant Robert Smith, who headed the Crime Device section of the Pennsylvania State

[1] Act of Dec. 6, 1972, P. L. (No. 334), 18 C.P.S.A. §5513.

Police, executed a search warrant that authorized a search of Stejan Printing Company, owned and operated by one Stephen Zentmeyer, appellant's co-conspirator. Zentmeyer operated the company in his family's residence in Lower Allen Township, Cumberland County. The search netted 27,000 football lottery tickets and 15,000 blank forms for printing additional football tickets. After the search, Zentmeyer revealed that he had been printing similar tickets for appellant for several months.

Appellant was thereafter indicted for conspiracy to violate §5513 of the Crimes Code, supra, which prohibits gambling and operating a lottery. He was tried and found guilty on February 14, 1974, by a judge sitting without a jury. Appellant was sentenced to a term of one year's imprisonment and to pay a fine of $2000. Appellant's motions in arrest of judgment and for a new trial were denied on June 26, 1974. This appeal followed the denial of those motions.

Appellant's first contention is that the lower court erred in refusing to allow defense counsel to cross-examine Sergeant Smith as to the basis of the warrant which authorized the search of Zentmeyer's home. The lower court rejected appellant's claim because the court believed that appellant did not have standing to raise the issue and because appellant did not file a pre-trial motion to suppress as required by Pennsylvania Rule of Criminal Procedure 323(b), thereby waiving the issue of the admissibility of the evidence. We cannot reach the merits of appellant's argument concerning his standing to challenge the search of his co-conspirator's home because the issue was in fact waived.

Rule 323(b) provides that "Unless the opportunity did not previously exist, or the interests of justice otherwise require, such application [to suppress the admission of evidence] shall be made only after a case has been returned to court and not later than ten days before the beginning of the trial session in which the case is listed for trial. . . . If timely application is not made hereunder, the issue of the admissibility of such evidence shall be deemed to be waived." There is no question that the appellant waived the issue unless his case is within one of the two exceptions to the rule. The first exception contemplates a situation in which defense counsel does not know of the existence of [illegible] e.g., Commonwealth v. Williams, 229 Pa. Superior Ct. 390, 323 A. 2d 862 (1974); Comment to Rule 323: ". . . the order of the judge determining admissibility is to be final and binding at trial, absent newly discovered and hitherto undiscoverable evidence." The appellant does not contend that his counsel was unaware of the evidence seized by the police.

The appellant alleges that the lower court erred in refusing to allow counsel to cross-examine the police sergeant concerning the legality of the search warrant. At the same time, however, appellant argues that the court at the time of trial was bound by our holding in Commonwealth v. Smith, 201 Pa. Superior Ct. 511, 193 A. 2d 778 (1963), that "[I]n order to qualify as a 'person aggrieved by an unlawful search or seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." Smith, supra, at 516, A. 2d at , citing Jones v.

United States, 362 U.S. 257, 261 (1960). Appellant's counsel argues that he did not file a motion to suppress the physical evidence because under Smith, appellant had no standing. After trial, but before the appellant's brief was filed, the Supreme Court decided Commonwealth v. Weeden et al., Pa. , 322 A. 2d 343 (1974), and we decided Commonwealth v. Tasco, 227 Pa. Superior Ct. 144, 323 A. 2d 831 (1974),[2] both of which appellant alleges rules for standing in criminal cases. Therefore, appellant contends that the interest of justice requires that we now consider the issue of standing to object to the search of the Zentmeyer residence.

Appellant's argument is superficially appealing. Under the law existing at the time of appellant's trial, however, his claim was at least arguable. For example, in Commonwealth v. Rowe, 433 Pa. 14, A. 2d (1969), the Court held that appellant had standing to challenge the search of the home of his co-felon's father. The search netted a pistol that belonged to the co-felon's father, but which police believed had been used by appellant and his co-felon to commit murder. Further, the facts of the Smith case, which appellant contends was controlling, are easily distinguished from those of the instant case: in Smith, the owner of the premises consented to the search of the premises, hence raising no serious question of an illegal search initially. Thus no valid reason appears for appellant's counsel's failure to file a pre-trial motion raising the issue of the legality of the

[2] Appellant's trial was held on February 14, 1974. The Supreme Court filed Weeden on July 1, 1974; we filed Tasco on April 3, 1974.

search of the Zentmeyer home and seizure of the lottery tickets; therefore, the issue was waived under Rule 323.[3]

In addition, appellant contends that "the charge against [appellant] was not brought until several weeks after Zentmeyer's arrest. This fact, along with the fact that at [appellant's] trial, Zentmeyer's testimony was the only evidence which linked appellant with the tickets, indicates that the police questioned Zentmeyer subsequent to his arrest, and that such questioning elicited statements from Zentmeyer which implicated appellant." In sum, appellant alleges that probable cause for appellant's arrest was founded on statements obtained illegally from Zentmeyer by the police. Appellant argues that he should have been permitted to cross-examine Zentmeyer on the issue. Because the issue goes to probable cause for arrest, it is properly raised in a pre-trial motion to suppress; because it was not so raised, the issue was waived under Rule 323, supra.

Finally, appellant contends that the evidence was insufficient to sustain his conviction. In determining whether the evidence is sufficient to prove appellant guilty beyond a reasonable doubt of the crimes charged, we must review the evidence in a light most favorable to the verdict winner. Commonwealth v. Blevins, 453 Pa. 481, A. 2d (1973). After a verdict of guilty, we must accept as true all of the evidence, direct or circumstantial, and all reasonable inferences arising from the

[3] The question might be more appropriately litigated in the form of a PCHA petition wherein a hearing court can determine whether failure to file a motion to suppress was ineffective assistance of counsel. See Commonwealth v. Clair, Pa. , 326 A. 2d 272 (1974).

evidence, upon which the trier of facts could properly have based the verdict. Commonwealth v. Fortune, Pa. , 318 A. 2d 327 (1974).

At trial, Zentmeyer testified that in July of 1973, appellant contracted with him to print tickets, a sample of which was provided by appellant. Thereafter, Zentmeyer made several deliveries of the tickets. The State Trooper, Sergeant Smith, found over 25,000 lottery tickets. The sergeant, who had extensive experience and training in vice activity, identified the tickets as lottery tickets and explained the manner in which a lottery participant used the ticket. We agree with the lower court's conclusion that "[a]n examination of the tickets themselves, even to one of less experience than Sgt. Smith, leaves little doubt as to the exact nature of the ticket. Although the ticket had printed on the top the words, 'for amusement only,' the fact there were 27,000 of them was a pretty clear indication of the nature of the amusement. We encounter no difficulty in drawing the inference that the purpose of the seized tickets was for the operation of a football lottery."

The judgment of sentence is affirmed.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA CRIMINAL

No. 44 February Term, 1974

Charge: Criminal Conspiracy

Commonwealth

vs.

John George Weyman

Re: Motion in Arrest of Judgment and for New Trial

Before Shughart, P. J., and Weidner, J.

OPINION AND ORDER OF COURT

The above-named defendant was charged with conspiracy to commit the unlawful act of printing and manufacturing lottery tickets. Following trial without a jury before the writer on February 14, 1974, the defendant was found guilty. A motion in arrest of judgment and for a

new trial has been filed which has been argued and is now before us for disposition.

At the trial, Stephen Zentmeyer testified that he owned and operated a printing shop in the basement of his home and that in July of 1973 the defendant asked him to print certain tickets similar to samples which were displayed by the defendant to him. An arrangement for the printing was made and thereafter Zentmeyer made deliveries of the tickets to the defendant on numerous Monday nights at various places away from the printing shop which were arranged in advance and at which time the defendant paid Zentmeyer for the printing. Discovery of the operation was made as a result of a search of Zentmeyer's premises on October 29, 1973, on the basis of a search warrant issued on complaint of the Pennsylvania State Police. Sgt. Robert Smith testified that as a result of the search of the Zentmeyer basement, 27,000 tickets were obtained. Samples of these tickets, which covered games played on November 3 and 4 of 1973, were offered into evidence. The search occurred at approximately 8:00 p.m. on a Monday night. Zentmeyer stated that it was his practice to deliver the tickets to the defendant each Monday night between 8:15 and 8:30 p.m. Sgt. Smith, a veteran of 34 years on the state police force, offered his expert opinion that these were football lottery tickets. An examination of the tickets themselves, even to one of less experience than Sgt. Smith, leaves little doubt as to the exact nature of the ticket. Although the ticket had printed on the top the words "for amusement only," the fact that there were 27,000 of them was a pretty clear indication of the nature of the amusement. We encounter no difficulty in drawing the inference that

the purpose of the seized tickets was for the operation of a football lottery.

Section 903(a)(1) of the Crimes Code of 1972, Act of December 6, 1972, P. L. , No. 334, 18 C.P.S.A. §903, makes it a crime for one to agree with another that ". . . they or one or more of them will engage in conduct which constitutes . . ." a "crime or an attempt or solicitation to commit such crime." Section 5512(b)(2) of the Crimes Code provides that an individual is guilty of a misdemeanor if he "(2) manufactures or prints . . . any unlawful lottery or numbers ticket or share, or any writing, token or other device purporting or intending to entitle the holder or bearer, or any other person, to any prize to be drawn or obtained in any lottery, or numbers game." Although Zentmeyer was an accomplice and had already entered a plea of guilty to the charge, we found his testimony to be clear, lucid, and completely credible. There is no rule in Pennsylvania forbidding a conviction on the uncorroborated testimony of an accomplice. Commonwealth v. Faulcon, 450 Pa. 414, 416 (1973). His testimony, therefore, was sufficient to link the defendant to the printing of the tickets. We likewise found the testimony of Sgt. Robert Smith to be completely credible.

The defendant attempted to impeach the credibility of Zentmeyer with an allegation that he had tendered a plea of guilty without benefit of counsel and without having been advised of his constitutional rights. We are, however, entitled to take judicial notice of the record in the case against Zentmeyer which was entered to this same number and term and which discloses that by a colloquy on February 4, 1974, Zentmeyer was fully apprised of his right to have an attorney, his right to have

free counsel if he had no funds to hire an attorney of his own, the possible sentence that might be imposed, the nature of the criminal allegations against him, the fact that he had a right to a jury trial at which time he would be considered innocent until proved guilty beyond a reasonable doubt, the effect of the entry of a guilty plea, and his right to appeal from the imposition of sentence. It is clear, therefore, that the allegation that Zentmeyer entered a plea without being advised of his rights is contrary to the fact. Even if Zentmeyer's constitutional rights had been violated in the entry of his plea of guilty, the defendant could not claim the benefit of the deprivation of the constitutional rights of Zentmeyer. Commonwealth v. Smith, 201 Pa. Superior Ct. 511, 516 (1963).

Finally, the defendant claims that he should have had the right to question the propriety of the issuance of the search warrant for the Zentmeyer premises. In support of this contention, he cites the case of Commonwealth v. Tasco, 227 Pa. Superior Ct. 144 (1974). There are two reasons why his reliance on Tasco is misplaced. In Tasco, a search warrant was issued for a certain premises allegedly being used for gambling purposes. When the warrant was executed, although not named therein, Tasco and others were on the premises and the evidence seized was used against them. The court cited Jones v. United States, 362 U.S. 257 (1962) for the proposition that a "person aggrieved by an unlawful search and seizure" under the federal rules included one in possession of the seized item or one who was legitimately on the premises. It is noted that in Jones and Tasco, the party claiming the right to contest the legality of the warrant was on the premises at the time of the search, which is not a fact in

the instant case. We do not deem the Tasco case controlling; on the contrary, in Commonwealth v. Smith, supra, at 516, the court said:

> ". . . Moreover, 'In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, *as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.*' Jones v. United States, 362 U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697, 702, 78 A.L.R. 2d 233. . . ." (Emphasis added.)

In any event, Pa. R. Crim. P. 323(b) provides that an application to suppress evidence shall be made . . . "not later than ten days before the beginning of the trial session in which the case is listed for trial, . . . If timely application is not made hereunder, the issue of the admissibility of such evidence shall be deemed to be waived." In this case, no application was made to suppress the evidence and therefore the issue may not be raised in this motion for new trial and in arrest of judgment.

ORDER OF COURT

AND NOW, June 26, 1974, for the reasons given, the motions for new trial and in arrest of judgment are overruled and the defendant is directed to appear for sentence at the call of the district attorney.

By the Court,
(s) Dale F. Shughart,
P. J.

APPENDIX C

SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 1959 Allocatur Docket

Commonwealth of Pennsylvania

v.

John George Weyman,

Petitioner

"Petition denied this 18th day of August, 1975

Per Curiam"